EXHIBIT C

Not Reported in F.Supp.2d, 2004 WL 632872 (W.D.Wis.)
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Only the Westlaw citation is currently available.

United States District Court,
W.D. Wisconsin.
LATINO FOOD MARKETERS, LLC, Plaintiff,
v.
OLE MEXICAN FOODS, INC., Defendant.

No. 03-C-0190-C.
March 30, 2004.

Marta T. Meyers, for Plaintiff.

Steven M. Streck, Axley Brynelson, Madison, WI, Kevin H. Hudson, Foltz Martin, LLC, Albert J. Bolet, III, Goico & Bolet, P.C., Atlanta, GA, C. Kent May, Attorney at Law, Pittsburgh, PA, for Defendants.

ORDER

CRABB, J.

***1** Defendant has filed two motions related to the structure of the trial in this case. First, defendant asks to present its evidence first, open first and close last. Second, defendant asks that the court try all issues in the case in one phase rather than bifurcating the trial into a liability phase and a damages phase.

Defendant's first motion will be granted. Both parties agree that a district court has discretion to alter the order of argument at trial. *Moylan v. Meadow Club, Inc.*, 979 F.2d 1246, 1251 (7th Cir.1992); *Silver v. New York Life Insurance Co.*, 116 F.2d 59, 62 (7th Cir.1940). As I have noted in other orders, the central factual dispute in this case is whether the November 2001 contract was properly executed. If it was, plaintiff will be liable for breach of contract by failing to give defendant the lowest prices and selling to defendant's customers, among other things.

It is *defendant's* burden to prove that the November 2001 contract exists. *Household Utilities, Inc. v. Andrews Co.*, 71 Wis.2d 17, 28-29, 236 N.W.2d 663, 669 (1976). To prove its own breach of contract claim, plaintiff has to show only that defendant did not pay the prices charged on the invoices. Because defendant does not deny that it paid less than the charged amount, there is nothing for plaintiff to prove. The only way that defendant can avoid liability is to prove its own breach of contract claim by proving the existence of the November 2001 contract. Because it is defendant rather than plaintiff that must prove facts to prevail, it makes sense to allow defendant to open first and close last. The situation in this case is analogous to that in *Moylan* and *Silver,* in which the court held that it was appropriate for the district court to allow the defendant to open first and close last when the only issue left in dispute was the defendant's affirmative defense.

Plaintiff cites no authority that would prohibit altering the trial in this way. Instead, plaintiff argues that it is the "master of its lawsuit" and that changing the order of argument will rob its deserved right to be in the "driver's seat." Plt.'s Br., dkt. # 135, at 5. It is true that a plaintiff in a lawsuit acquires certain benefits by virtue of being plaintiff. For example, a plaintiff gets to choose which claims it will assert and where it will bring those claims to be heard. *Hart v. Wal-Mart Stores, Inc. Associates' Health and Welfare Plan,* No. 03-2832, --- F.3d ----, 2004 WL 370008 (7th Cir. Mar.1, 2004). However, even a plaintiff's choice of forum may be denied when it brings federal claims to state court or when litigating a case in the plaintiff's chosen forum will be greatly inconvenient for the defendant. The privilege of opening first and closing last is not given to plaintiffs simply because they are plaintiffs. Rather, fairness requires that the party with the burden of proof should have the first and last opportunity to persuade the jury of its position. When that party is the defendant, it makes sense to give that privilege to the defendant.

*2 Defendant's motion to try liability and damages together will be denied. In its brief in support of its motion, defendant argues that "damages and liability are inextricably linked" because its counterclaims for setoff and recoupment will allow defendant "to avoid liability." Dft.'s Br., dkt. # 120, at 2. I agree with plaintiff's assessment of this argument: "Nonsense." A recoupment is a reduction of a claim by the breaching party because of an obligation of the non-breaching party that arose out of the same claim. *Zweck v. D.P. Way Corp.*, 70 Wis.2d 426, 433-34, 234 N.W.2d 921, 925 (1975). A set-off is a separate claim by the breaching party against the non-breaching party that arises out of a transaction extrinsic to the breach of contract claim. *Id.* Thus, set-off and recoupment may allow a breaching party to avoid having to pay *damages* for a breach of contract, but they are not defenses to *liability*. Whether or not defendant is entitled to a recoupment or a set-off has no bearing on the question whether defendant breached its contract with plaintiff. I see no potential prejudice to defendant if it is unable to show during the liability phase that plaintiff's damages should be reduced as a result of defendant's own claims. If anything, allowing defendant to do so would prejudice *plaintiff* because defendant's evidence regarding a potential reduction in damages could confuse the jury into believing that it should not find a breach of contract in favor of plaintiff if defendant shows it is entitled to a recoupment or set-off. The trial will remain bifurcated into a liability and a damages phase.

ORDER

IT IS ORDERED that

1. Defendant Ole Mexican Foods' motion to present its evidence first, open first and close last is GRANTED.

2. Defendant's motion to "join all issues during the trial of this matter" is DENIED.

W.D.Wis.,2004.
Latino Food Marketers, LLC v. Ole Mexican Foods, Inc.

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